

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHAN CREWS,

Defendant-Appellant.

UNPUBLISHED
October 27, 1998

No. 196602
St. Clair County
LC No. 95-002083 FC

Before: Corrigan, C.J., and MacKenzie and R. P. Griffin*, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions for second-degree murder, MCL 750.317; MSA 28.549, carrying a dangerous weapon with unlawful intent, MCL 750.226; MSA 28.423, two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and habitual offender, second offense, MCL 769.10; MSA 28.1082. We affirm.

Defendant was charged with open murder and the weapons offenses following a gang-related shooting in which a member of a rival gang was killed. Defendant contended that another individual shot the victim. A first trial ended in a hung jury. Before retrial, defendant moved to change venue. In addition, defendant moved in limine to exclude evidence relating to bullet fragments, determined to have been fired from the murder weapon, that were recovered from the same street corner in connection with a shooting incident that occurred two weeks before the murder. That motion also sought to exclude evidence relating to gangs and gang activities. Defendant's allegations of error with regard to the trial court's decision to deny both these motions form the basis for defendant's first three issues on appeal.

We will first address defendant's claim that the trial court abused its discretion in denying his motion for change of venue due to pretrial publicity. Defendant presented no evidence of media reports, bias in the community, or actual prejudice, and therefore failed to meet his burden of demonstrating prejudicial publicity. *People v Hack*, 219 Mich App 299, 311; 556 NW2d 187 (1996). Furthermore, the attorneys in the case fully participated in the questioning of the potential jurors and, as defendant admits in his brief to this Court, all jurors who said they had

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

knowledge of the case and could not be impartial were dismissed for cause. *People v Jendrzewski*, 455 Mich 495, 509-512; 566 NW2d 530 (1997); compare *People v Tyburski*, 445 Mich 606; 518 NW2d 441 (1994). This is even more significant in light of the fact that defendant failed to exercise all his peremptory challenges. See *People v Bailey*, 169 Mich App 492, 496; 426 NW2d 755 (1988). Given the lack of evidence of prejudicial media exposure and the fact that defense counsel was afforded an opportunity to examine the potential jurors for bias, we conclude that the trial court did not abuse its discretion when it denied defendant's motion for a change of venue.

Defendant also contends that the trial court abused its discretion by allowing into evidence testimony relating to gangs and gang activity because this constituted inadmissible character evidence. We disagree. The evidence was integrally related to the facts and issues of the case, particularly defendant's motivation for the murder. MRE 404(b); MCL 768.27; MSA 28.1050. The cases cited by defendant are distinguishable because the evidence of gang activity in those cases was unrelated to the offense; in contrast, in this case the testimony was essential to "an intelligible presentation of the full context in which disputed events took place." *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). In any event, because defendant himself testified at length about his membership and role in the Black Mafia gang, the rivalries between various gangs, and the organization and practices of various gangs, we decline to reverse on this ground.

Defendant also argues that the trial court abused its discretion in admitting evidence of bullet fragments that had been recovered in connection with a shooting that occurred on the same street corner two weeks before the murder. Defendant claims that the fragments, which were also from the gun used in this case, were inadmissible under MRE 403 because the evidence was not relevant to the incident giving rise to the charges in this case and there was no evidence connecting defendant to the prior occurrence. However, relevancy is not determined solely on the basis of the factual circumstances giving rise to the charges. Rather, "the relationship of the elements of the charge, the theories of admissibility, and the defenses that are asserted governs what is relevant and material." *People v Brooks*, 453 Mich 511, 520; 557 NW2d 106 (1996), quoting *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993). In this case, the evidence was relevant to disproving defendant's theory of the case; defendant's theory was that the murderer was a person who was not a member of a gang, while the prosecution sought to prove that the murder weapon was a "gang gun" owned by the Black Mafia gang and used to defend gang territory. Because access to the murder weapon was probative of defendant's guilt or innocence, we conclude that this argument does not provide grounds for reversal.

In the alternative, defendant asserts that the evidence relating to the prior shooting was inadmissible under MRE 404(b) as impermissible "other acts" evidence. However, MRE 404(b) is inapplicable where no character inferences may logically be drawn from the evidence. *VanderVliet*, *supra*, p 64. Here, the trial court restricted the prosecution to demonstrating only that bullets from the same gun had been found on the same corner in connection with a previous shooting shortly before the murder. The prosecutor was not allowed to implicate defendant in any way or inform the jury who the target was or whether anyone was injured. Thus, this argument also fails. Moreover, any error in the admission of the evidence was harmless in view of the overwhelming evidence of defendant's guilt. *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993). Two witnesses unequivocally

identified defendant as the gunman, and another stated that he saw defendant place a gun in the waistband of his pants just after the shooting. Defendant was placed in the location of the assailant by other witnesses, and the testimony of all these witnesses was corroborated by two other witnesses, one of which was neither a gang member nor a suspect. The gunman was uniformly described as wearing a long dark jacket with the hood up; the only other suspect, and the individual defendant claims committed the murder, was wearing a short-sleeved shirt. Furthermore, defendant admitted that his gang frequently purchased guns of the same type as the murder weapon from another gang.

Next, defendant challenges the trial court's admission at trial of a redacted copy of a letter defendant wrote to a fellow gang member while he was in custody awaiting trial. When the letter was returned to the jail as undeliverable, corrections personnel opened, read, and copied the letter after recognizing defendant's handwriting. Defendant claims that this action violated his Fourth Amendment right against unreasonable searches and seizures and that the letter was inadmissible as rebuttal evidence. The trial court correctly found defendant's claim to be without merit. It is well established that jail authorities have the general right to open and inspect prisoners' mail and that the content of such letters is admissible at trial. *People v Paul Williams*, 118 Mich App 117; 325 NW2d 4 (1982), *People v Oliver*, 63 Mich App 509, 515; 234 NW2d 679 (1975). The letter was properly admitted during defendant's cross-examination to impeach his credibility. The fact that defendant had not yet been convicted does not compel a different result. *People v Phillips*, 219 Mich App 159; 555 NW2d 742 (1996).

Defendant's next issues involve challenges to the jury instructions. In reviewing a trial court's instructions to the jury, this Court examines the instructions as a whole; there is no basis for reversal if the instructions adequately presented to the jury the issues to be tried. *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997); *People v Kelly*, 423 Mich 261, 270-272; 378 NW2d 365 (1985). The instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is evidence in support. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). A jury verdict may not be set aside on the ground of instructional error unless failure to do so would result in manifest injustice. MCL 769.26; MSA 28.1086; *Dumas*, *supra*.

First, defendant contends that the trial court's instruction to the jury regarding his flight from the country after the shooting was not warranted by the evidence. We disagree. Defendant admitted that he knew on Saturday night that the police were contemplating issuing a warrant for his arrest, and defendant's father told the police that defendant left the country immediately after the shooting. Defendant also did not attempt to notify the police of his whereabouts before he left. Therefore, there was evidence to support the giving of the instruction with regard to flight. Moreover, there was no prejudice to defendant because the instruction also permitted the jury to conclude that defendant left only because of the threat of retaliation from members of the victim's gang. Further, the instruction properly informed the jury that evidence that defendant ran away was not probative of guilt or innocence, but only of defendant's consciousness of guilt. See *People v Kraai*, 92 Mich App 398, 408-409; 285 NW2d 309 (1979). Thus, because the instruction fairly presented the issue to the jury based on the evidence presented, this issue does not provide grounds for reversal.

Defendant next contends that the trial court erred in refusing defendant's request that the jury be given an instruction regarding the victim's lost T-shirt. Following the autopsy, all of the victim's clothing was lost by the medical examiner's office. As a result, defense counsel requested an instruction that would have allowed the jury to assume that any evidence derived from the victim's T-shirt would have been unfavorable to the prosecution. However, the giving of the instruction was not warranted on the facts of this case. The proper factors to be considered in such cases are (1) whether the evidence was deliberately suppressed, (2) whether the evidence was requested by the defendant during discovery, and (3) viewed in retrospect, whether the evidence would have been significant to the defendant's defense. *People v Davis*, 199 Mich App 502; 503 NW2d 457 (1993). Just as in *Davis*, the prosecutor in this case did not refuse to produce the evidence; instead, the evidence was simply not available, in this case because it was lost by the medical examiner. *Id.* at 514. Where there is no showing that the prosecutor acted in bad faith in failing to produce the evidence, no error may be predicated on a court's refusal to give the requested instruction. *Id.* at 515. Moreover, the evidence was not significant to defendant's defense. *Id.* at 514. The medical expert testified that if the victim had been shot at close range, as the defense contended, there would have been gunpowder residue in the wound itself, and there was none. The firearms expert also testified that tests for gunpowder residue on clothing are meaningless without the weapon that fired the shot, which was never recovered in this case. Consequently, the trial court properly refused to give the requested instruction.

Defendant's last allegation of error with regard to the jury instructions involves the court's refusal to give defendant's requested instruction with regard to the definition of reasonable doubt. Defendant contends that the standard jury instruction given in this case, CJI2d 3.2(3), is inadequate. However, this Court specifically endorsed this instruction as adequately presenting the concept of reasonable doubt to the jury in *People v Sammons*, 191 Mich App 351; 478 NW2d 901 (1991). Consequently, we find no merit in any of defendant's allegations of instructional error.

Defendant's last issue is a claim that his constitutional guarantees against double jeopardy were violated when he was convicted of both carrying a dangerous weapon with unlawful intent and felony-firearm. This Court addressed this precise issue in *People v MacMillan*, 95 Mich App 292; 290 NW2d 125 (1980), and rejected an identical claim. Therefore, we find no merit in this issue.

Affirmed.

/s/ Maura D. Corrigan
/s/ Barbara B. MacKenzie
/s/ Robert P. Griffin